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Supreme Court, U.S.
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No. 98-1918

In the

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD HALL LIGHTFOOT,

Petitioner,

vs.

UNION CARBIDE CORPORATION,
A.W. LUTZ, President, Industrial Chemicals Division,
and W.E. SHACKELFORD, Vice President,
Industrial Chemicals Division,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JOEL E. COHEN
Counsel of Record
NANCY SOLOMON WEISS
MCDERMOTT, WILL & EMERY
Attorneys for Respondents Union Carbide Corporation, A.W. Lutz and W.E. Shackelford
50 Rockefeller Plaza
New York, New York 10020
(212) 547-5400

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Rule 29.6 Statement

Pursuant to Rule 29.6 of the Rules of this Court, respondent Union Carbide Corporation states that it has less than 100% ownership interest in the following subsidiaries and affiliates that have issued shares to the public: Administration y Servicios Carmex, S.A. de C.V.; Cia National De Calcareous e Derivados; Concalcarbureto de Calcio S.A.; Electrometalurgia Sandade Ltda.; GenEx, Ltd.; Genesis, Ltd.; Hill Equipment Co.; Illini Tec Systems, Inc.; Nitropet, S.A.; Operadora Perinote, S.A. de C.V.; Oxigenio Edy, S.A.; S.A. Rapidox Rio Commercio e Participacoes; Rapidox Gases Industries Ltda.; U.C. Investments Limited; Unigas S.p.A.; Union Carbide Canada Limited; Union Carbide Mexicana, S.A. de V.C.; Union Gas Company Limited; Union Carbide Pakistan Limited; and Welders Supply Company.

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BRIEF IN OPPOSITION

Statutory Provisions Involved

Other than certain jurisdictional statutes, the statutory provisions involved in this case are the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*; and the Judiciary and Judicial Procedure Act, 28 U.S.C. §§ 144 and 455. The relevant portions of ADEA and ERISA that are not set out in petitioner's appendix are set out in respondents' appendix (hereafter, "Res. App.") at A6-A7.

Contrary to petitioner's suggestion, this case does not involve the Fair Labor Standards Act, 29 U.S.C. §§ 216 and 255, or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).

Counterstatement of the Case

This is a highly factual case, carefully evaluated and correctly decided by both the trial court that dismissed certain of petitioner's claims prior to trial and remitted the award granted by the jury at the first trial in this case (hereafter, the "First Trial"), and by the Court of Appeals that ultimately affirmed the judgment after the second trial in this case (hereafter, the "Second Trial") and affirmed all of the district court's other decisions in all respects.

Petitioner, a former marketing employee at Union Carbide Corporation ("Carbide"), was terminated by Carbide effective June 30, 1992 in connection with a reduction in force. Petitioner was selected for termination because of his low ranking in a ranking session conducted by his managers of the twelve (12) marketing employees in his business group.[1] Immediately upon his termination, petitioner began receiving severance pay from Carbide which entitled him to his full salary and benefits through February 1993. Petitioner also began collecting a $61,000 per year pension.

In December 1992, because another marketing employee left petitioner's former business group, and while petitioner was still receiving severance payments from Carbide, Carbide offered petitioner his former job back at the same pay and benefits and without any loss of service credit. The offer letter sent by Carbide to petitioner stated that the offer

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[1] Petitioner asserts in his Statement of the Case that he experienced retaliatory demotions in the years prior to his termination. (*See* Petition for a Writ of Certiorari (hereafter, "Pet.") at 3). No such finding was made by the jury or the lower courts but, rather, this claim was dismissed as untimely, as set forth *infra* pp. 15-17.

was unconditional and gave petitioner three weeks to accept the offer. Petitioner's attorney protested the offer of reinstatement and petitioner never accepted the offer.

Instead, in February 1993, before his severance payments ended, petitioner accepted a position with a consulting firm for Carbide's competitors in the chemical industry, CPI, Inc. ("CPI"). CPI had been courting petitioner since early summer 1992 and petitioner has worked continuously for CPI as a consultant from February 1993 through the Second Trial in this case in January 1998.

After rejecting Carbide's reinstatement offer, petitioner instead pursued claims against respondents that Carbide terminated him due to his age in violation of the ADEA, the New York Human Rights Law ("NYHRL"), N.Y. Exec. Law § 290 *et seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.*; that Carbide terminated him in order to interfere with his pension benefits in violation of ERISA; and for a myriad of common law causes of action.

After discovery was completed, respondents moved the district court for summary judgment dismissing petitioner's complaint in the entirety. The district court granted partial summary judgment to respondents and dismissed all but petitioner's age discrimination claims under the ADEA and the NYHRL. Further, the district court held that because petitioner had rejected Carbide's December 1992 bona fide offer to reinstate him to his former position, petitioner could not recover back or front pay in the event that he prevailed on his age discrimination claims at trial. (*See* petitioner's appendix (hereafter, "Pet. App.") at 81a-93a).

At a pre-trial conference in June 1995, at petitioner's request, the district court reconsidered petitioner's claims for pre-termination discrimination, relating to alleged discriminatory demotions petitioner experienced in the years prior to his termination. The district court ruled that petitioner's claims for pre-termination discrimination were

time-barred. (Pet App. at 65a-66a; Res. App. at A1-A4). The district court also ruled at the June 1995 conference that because petitioner was precluded from recovering damages for back and front pay and because petitioner had not sought any other form of relief under ADEA, petitioner's ADEA claim must be dismissed. (Res. App. at A1-A4).

At the June 1995 pre-trial conference, the district court also attempted to settle the case. In this connection, with the consent of all parties, the district court met separately with petitioner and with respondents. However, because the parties were too far apart in the amounts they were willing to offer and accept, respectively, a settlement could not be reached. Accordingly, petitioner's NYHRL claim proceeded to trial before a jury, at which petitioner could seek only compensatory damages under the NYHRL, but not back or front pay. The jury returned a verdict that Carbide had terminated petitioner because of his age in violation of the NYHRL and awarded petitioner $750,000 for mental anguish and damage to reputation.

Thereafter, respondents moved alternatively for a new trial, a new trial on damages or remittitur of the damages award on the grounds that, *inter alia*, the amount of the award was unsupported by the evidence of damages presented at trial. The district court denied respondents' motion for a new trial but granted respondents' motion for remittitur. Thus, in accordance with New York Civil Practice Law & Rules § 5501(c), that provides for the remittitur of excessive jury verdicts under New York law, the district court remitted the jury's award to $75,000. In connection with its decision, however, the district court failed to offer petitioner the option of either accepting the remitted award or electing to have a new trial on damages. (Pet. App. at 54a-62a).

Subsequent to the district court's grant of a remittitur, petitioner moved to disqualify the district judge from any further proceedings in the action on the ground of alleged bias. Petitioner based his claim of bias upon the district judge's comments and actions in meeting separately with the petitioner and with respondents in an effort to settle the action at the June 1995 pre-trial conference and upon the district court's order remitting the excessive jury award. The district court denied petitioner's motion. (Res. App. at A5).

At that point, petitioner appealed and respondents cross-appealed from various district court decisions to the Court of Appeals for the Second Circuit. In March 1997, the Court of Appeals issued a decision ("*Lightfoot I*") in which it affirmed all of the district court's decisions except the grant of a remittitur. (Pet. App. at 11a-43a). With respect to the district court's grant of a remittitur, the Court of Appeals held that the district court had erred in granting a remittitur without offering petitioner the option of electing a new trial on damages. Accordingly, the Court of Appeals remanded the case to the district court to allow petitioner the opportunity to exercise that option. (Pet. App. at 41a-43a). The Court of Appeals did *not* hold, however, that there was anything improper in the district court's remitting the verdict to $75,000, nor did it hold that the district court should have allowed the $750,000 verdict to stand (Pet. App. at 41a-43a), even though petitioner argued for such rulings.

In May 1997, the district court held a pre-trial conference with the parties at which it offered petitioner the opportunity to accept the remitted award or to elect a new trial on damages. The district court also offered its services as a mediator for the parties to settle the case. In attempting to facilitate a resolution of the case, the district court advised petitioner that, based upon the evidence presented at the first trial, $75,000 was an appropriate award. Petitioner indicated that he wished to proceed with a second trial on damages.

Subsequently in May 1997, petitioner moved a second time for an order of recusal on the ground of alleged bias. This second motion was based on petitioner's claim that the district court's comments at the May 1997 pre-trial conference evidenced bias. The district court denied the motion, noting in an August 28, 1997[2] decision that the comments at the pre-trial conference "merely reiterated" the district court's view that was embodied in the October 1995 remittitur order and stating that no reasonable person would construe the comments as evidencing bias.[3] (Pet App. at 49a-53a).

The Second Trial on petitioner's claim for compensatory damages under the NYHRL was held in January 1998.[4] The jury returned a verdict that petitioner had sustained mental anguish and/or pain and suffering as a result of his termination by Carbide and awarded him $20,000 as damages. The instant petition for certiorari then ensued.

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[2] Petitioner's appendix incorrectly indicates the date of the decision as August 28, 1998.

[3] Additionally, the district court explicitly noted that evidence presented at the Second Trial might support a larger award. (Pet. App. at 51a-52a).

[4] Petitioner complains in his Statement of the Case that certain evidence that he proffered at the Second Trial was excluded by the district court. (Pet. at 5). Because petitioner neither included this issue in the Questions Presented for Review, nor in his Reasons for Granting the Petition, this issue is not a matter upon which petitioner is properly seeking review. *See* Sup. Ct. R. 14.1(a).

Summary of Argument

The instant petition represents the latest attempt by petitioner in his continuing quest to extract as large a payment from Carbide as possible, despite the facts that he has suffered minimal, if any, damages since his termination and that this matter could have largely been resolved many years ago had petitioner accepted Carbide's bona fide offer of reinstatement.

Throughout this litigation, petitioner has sought to increase his monetary award not only by appealing twice to the Court of Appeals from nearly every adverse ruling issued against him by the district court but by, *inter alia*, moving for attorneys' fees under ADEA despite the pre-trial dismissal of his ADEA claim; twice moving to disqualify the district judge due to alleged bias; and making post-trial, post-appeal motions to amend his complaint.

Indeed, petitioner never gives up. However, the reason that petitioner seeks additional compensatory damages — which reason was revealed at the Second Trial — simply is not a basis under the law for awarding such damages. At the Second Trial, while testifying about petitioner's purported concern about his financial situation, petitioner's expert psychiatric witness let slip that petitioner "has spent over $350,000 on this lawsuit alone" and that one of petitioner's concerns is that "he feels that he is never going to get that money back." Petitioner's desire to recoup his "investment," while understandable, does not provide a valid basis for awarding compensatory damages under the NYHRL.

In this latest attempt, petitioner fails to present any basis warranting review by this Court. Not only are petitioner's arguments concerning purported errors by the Court of Appeals erroneous and insufficient grounds for Supreme Court review, but the petition consists almost exclusively of novel arguments and theories that were never raised below. For these reasons, and because the Court of Appeals correctly

applied the law to affirm the second jury verdict and all of the decisions of the district court, the petition for certiorari must be denied.

Reasons Why the Petition Should Be Denied

I. Petitioner Has Not Presented any Valid Ground for Granting His Petition for Writ of Certiorari.

Rule 10 of the Rules of the Supreme Court makes clear that a petition for a writ of certiorari will be granted only for "compelling reasons." *See* Sup. Ct. R. 10. As this Court has explained, "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991); *see also* Sup. Ct. R. 10. As Rule 10 further states, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Indeed, this Court has indicated that it is not the role of the Court to undertake to review findings of fact by the lower courts, particularly where the trial court and court of appeals make concurrent findings of fact. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665, 107 S. Ct. 2617, 2623 (1987).

Here, petitioner has not demonstrated any basis for this Court to grant certiorari. Plaintiff has not presented any conflicts in decisions among the courts of appeals or any state court of last resort concerning an important federal question. Instead, petitioner here essentially seeks reconsideration of purely factual findings made by the district court and affirmed by the Court of Appeals in connection with more than one half dozen different issues.

Moreover, in an unpersuasive effort to convince this Court that he in fact is presenting important legal questions for review, petitioner devises new theories regarding the remedies available under ADEA. None of petitioner's new-fangled theories was presented to the courts below, and none of them garners any support from any caselaw.

In short, petitioner has not presented any compelling reason that this Court should grant certiorari, and therefore the petition should be denied.

II. The Court of Appeals and the District Court Correctly Decided the Factual Issues Raised By the Instant Petition.

A. The Lower Courts Properly Dismissed Petitioner's Claims for Back and Front Pay.

The district court properly granted and the Court of Appeals properly affirmed the grant of summary judgment as to petitioner's claims for back and front pay on his age discrimination claims because, as a matter of law, petitioner waived those claims by declining Carbide's unconditional offer of reinstatement. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 241, 102 S. Ct. 3057, 3070 (1982).

Petitioner first attempts to obtain review by this Court of the grant of summary judgment on his back and front pay claims by arguing that fact issues existed as to whether he unreasonably rejected the reinstatement offer. (Pet. at 8, 10-11). However, where the district court and Court of Appeals concurrently decided that no material issues of fact existed that petitioner unreasonably rejected the reinstatement offer, petitioner's attempt to re-litigate this fact-laden issue in this Court must be rejected. *See Goodman*, 482 U.S. at 665, 107 S. Ct. at 2623.

Petitioner also attempts to obtain review by this Court by arguing that the holding in *Ford Motor Co.* was "expressly limited" to Title VII claims and that the remedial provisions of the ADEA, which derive from the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, preclude the application of *Ford Motor Co.* to ADEA claims. (Pet. at 6-8). Not only does petitioner provide no authority for this inventive argument, but, this argument was not raised by petitioner before either the district court or the Court of Appeals. As such, this argument must be disregarded by the Court. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 464, 117 S. Ct. 905, 912 (1997) (declining to consider argument that was inadequately preserved in prior proceedings); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400, 116 S. Ct. 1396, 1402 (1996) (declining to consider argument not advanced before Court of Appeals, stating "we 'generally do not address arguments that were not the basis for the decision below.'"); *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 16, 24, 106 S. Ct. 1678, 1681 (1986) (noting that Court's normal practice is "to refrain from addressing issues not raised in the Court of Appeals").

Nevertheless, petitioner's argument that the remedial scheme of ADEA does not permit the application of the holding of *Ford Motor Co.* can readily be disposed of. In *Ford Motor Co.*, this Court explained that, consistent with Title VII's goal of ending discrimination and providing jobs to victims of age discrimination, Title VII defendants should be encouraged to "make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace." 458 U.S. at 228, 102 S. Ct. at 3064. Similarly, the ADEA is designed to encourage the employment of older persons, to encourage employers and workers to find ways of meeting problems arising from the impact of age on employment, and, like Title VII, to encourage employers and workers to effect voluntary

compliance through informal methods of conciliation. *See* 29 U.S.C. §§ 621(b), 626(b).

In addition, ADEA remedies are designed to be compensatory, to make the plaintiff whole, and are not designed to be punitive. *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1469 (5th Cir. 1989). In this connection, it is well-settled that an ADEA plaintiff, like a Title VII plaintiff, has a duty to mitigate his back and front pay damages by using reasonable diligence to find and accept suitable employment. *See Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 502 (8th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1763 (1999); *Hansard*, 865 F.2d at 1468; *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1339, 1345 (9th Cir. 1987). In view of the ADEA's goal of encouraging voluntary compliance with its mandates, and the requirement that ADEA plaintiffs mitigate their damages, the Courts of Appeals and district courts have consistently applied *Ford Motor Co.* to hold that ADEA plaintiffs who unreasonably reject offers of reinstatement are precluded from recovering back and front pay. *See, e.g., Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290 (11th Cir. 1989) (holding that ADEA plaintiff who refused offer of reinstatement could not recover front pay); *Giandonato v. Sybron Corp.*, 804 F.2d 120 (10th Cir. 1986) (holding that ADEA plaintiff who refused offer of reinstatement could not recover back pay).

Petitioner's argument that to apply *Ford Motor Co.* to ADEA claims is somehow inconsistent with the remedial scheme of ADEA not only defies logic, but is without any supporting authority. His statement that the "language [of the ADEA] does not permit such action" (Pet. at 8) is simply false. Rather, Congress granted the courts broad authority to fashion appropriate relief for ADEA claims. *See* 29 U.S.C. § 626(b) ("[i]n any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter. . . ."). Accordingly, the grant of summary judgment as to petitioner's back and front pay claims was entirely

proper and consistent with well-settled caselaw among the Courts of Appeals, and petitioner's disingenuous claim that this matter raises an important "issue of first impression" (Pet. at 9) warranting Supreme Court review must be rejected.

In yet another inventive argument, petitioner contends that the lower courts erred in holding that petitioner was not entitled to back pay during the time that he was receiving severance payments from July 1, 1992 through the date that he rejected Carbide's offer of reinstatement, because severance payments do not constitute "wages" under the ADEA.[5] (Pet. at 11-12). This argument, too, was never raised before the Court of Appeals and, therefore, should be disregarded by this Court. *See supra* p. 10. In any event, petitioner provides no support for his contention that payments received as severance should not offset a claim for back pay for violation of ADEA. To the contrary, it is well-settled that any interim earnings received by an ADEA plaintiff subsequent to his termination, including severance pay, will offset a back pay award. *See Kirsch v. Fleet St., Ltd.*, 148 F.3d 149 (2d Cir. 1998) (deducting from back pay award to ADEA plaintiff amount of money he received from defendant as severance); *Rhodes v. Guiberson Oil Tools*, 82 F.3d 615 (5th Cir. 1996) (same); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132 (7th Cir. 1994) (holding that ADEA plaintiff was entitled to back pay from date that severance payments ceased); *Smith v. World Ins. Co.*, 38 F.3d 1456 (8th Cir. 1994) (reducing back pay award by amount of severance

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[5] Petitioner makes this assertion after first presenting another convoluted argument that his refusal of the reinstatement offer did not constitute "post-termination wrongdoing," and therefore should not preclude him from recovering back and front pay, under *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 115 S. Ct. 879 (1995). (Pet. at 10). Petitioner's argument is simply baffling. The issue here has never been that Carbide discovered after-acquired evidence of wrongdoing by petitioner that would have resulted in his termination — as was the issue in *McKennon* — but, rather, whether petitioner unreasonably failed to mitigate his damages.

ADEA plaintiff received); *Blum v. Witco Chem. Corp.*, 829 F.2d 367 (3d Cir. 1987) (ADEA plaintiffs could not receive back pay during time period they were receiving severance pay). Accordingly, petitioner's attempt to characterize the denial of back pay to him during the time that he was receiving his full salary as severance as a "nullification" of the "remedial provisions of the ADEA" (Pet. at 12) is entirely without merit.

In sum, the lower courts properly precluded petitioner from recovering back and front pay, and petitioner has presented no basis for Supreme Court review of this factual matter.

B. The Lower Courts Properly Dismissed Petitioner's ADEA Claim and Correctly Denied Petitioner's Request for Attorneys' Fees Under ADEA.

Petitioner further argues that, in view of the jury's finding that he was a "victim of age discrimination" under the NYHRL (Pet. at 13-14), he was improperly deprived by the lower courts of remedies under ADEA, including attorneys' fees. This argument, too, presents no basis for review.

First, petitioner's ADEA claim was correctly dismissed prior to trial in view of the unavailability of the remedy sought by petitioner for that claim. Specifically, petitioner never sought equitable relief for the alleged ADEA violation, other than back and front pay, which were foreclosed due to his rejection of Carbide's reinstatement offer. As the lower courts correctly recognized, petitioner's post-trial attempt to urge a claim for equitable relief, by reference to boilerplate language in the prayer for relief of his Amended Complaint seeking "such other and further relief as to this Court may seem just and proper," did not alter the fact that petitioner sought only monetary relief. (Pet. App. at 30a-31a). *See Walker v. Anderson Elec. Connectors*, 944 F.2d 841 (11th

Cir. 1991) (denying post-trial motion for injunctive and declaratory relief made by plaintiff who had not previously sought such relief, in an effort to obtain remedy on which to hinge award of attorneys' fees). Nor could petitioner even identify what equitable relief would be appropriate in view of his rejection of Carbide's offer of reinstatement. (Pet. App. at 30a-31a).

It is well-settled that in the absence of an available remedy for a claim, dismissal of the claim is appropriate. A party will not be permitted to maintain a claim for which no available remedy was sought solely to enable that party to recover attorneys' fees. *See Hale v. Marsh*, 808 F.2d 616, 620 (7th Cir. 1986) (where no viable remedy was available to Title VII plaintiff, court dismissed claim because "[a] Title VII suit [cannot] be maintained for the sole purpose of obtaining an attorney's fee for the plaintiff's lawyer"); *McLaughlin v. State of New York, Governor's Office of Employee Relations*, 784 F. Supp. 961 (N.D.N.Y. 1992) (same).

Because petitioner had no remedy under ADEA, his ADEA claim was properly dismissed and, accordingly, his motion for attorneys' fees under ADEA was correctly denied. *See Walker*, 944 F.2d 841 (mere finding that plaintiff's rights had been violated, without a corresponding remedy, did not qualify plaintiff as a "prevailing party" entitled to attorneys' fees under Title VII).

In sum, no authority supports petitioner's view that he was entitled to recover attorneys' fees under ADEA simply because he prevailed on a NYHRL claim and petitioner has presented no compelling reason for the Court's review of this matter.

C. The Lower Courts Properly Granted Summary Judgment as to Petitioner's Pre-Termination Discrimination Claims.

In his continued quest for a viable remedy for an ADEA claim on which to hinge a request for attorneys' fees, petitioner argues that he was entitled to back pay under ADEA for alleged demotions and other discriminatory acts he purportedly experienced in the years prior to his termination. (Pet. at 3, 12-13). Here, again, petitioner essentially seeks reconsideration of fact-laden issues that were consistently decided by the district court that granted summary judgment as to his pre-termination claims and the Court of Appeals that affirmed the grant of summary judgment.

Specifically, both lower courts rejected petitioner's argument that his pre-termination discrimination claims, for which petitioner failed to timely file charges with the Equal Employment Opportunity Commission ("EEOC") pursuant to 29 U.S.C. §§ 626(d) and 633(b), should nevertheless have been permitted to go forward because the pre-termination incidents, together with his termination, constituted a "continuing violation." (Pet. at 13). The lower courts, after each conducting a careful factual analysis of petitioner's pre-termination claims, consistently held that the facts concerning the alleged pre-termination claims, as set forth by petitioner, did not support a finding of a continuing violation. Rather, as the Court of Appeals aptly stated, "completed acts such as a termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment, are not acts of a 'continuing' nature." (Pet. App. at 24a (quoting *Malarkey v. Texaco, Inc.*, 559 F. Supp. 117, 121 (S.D.N.Y. 1982), *aff'd*, 704 F.2d 674 (2d Cir. 1983)). Therefore, as the lower courts held, petitioner could not transform his untimely pre-temination claims into a continuing violation and summary judgment as to his pre-termination claims was warranted. (Pet. App. at 65a-66a; Res. App. at Al-A4).

Petitioner has presented no compelling reason that the Supreme Court should re-visit the concurrent factual determinations of both lower courts.

Undeterred, however, petitioner disengenuously argues that Supreme Court review is warranted because a "disparity" exists between the Second Circuit Court of Appeals' decision and decisions of other Courts of Appeals in which continuing violations were found. (Pet. at 13). No such "disparity" in the Courts of Appeals' treatment of the continuing violation doctrine exists. Rather, contrary to petitioner's contention, the Second Circuit Court of Appeals applied the continuing violation doctrine in a manner consistent with the treatment accorded that doctrine by other Courts of Appeals. The Courts of Appeals have consistently held that the continuing violation doctrine is not applicable to discrete and dissimilar acts of alleged discrimination. *See, e.g., Stolzenburg v. Ford Motor Co.*, 143 F.3d 402, 405 (8th Cir. 1998) (denials of promotions "were discrete employment actions" that did not constitute a continuing violation); *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 446 (7th Cir. 1994) (rejecting claim of continuing violation because plaintiffs had not demonstrated that "defendant's acts were 'related closely enough to constitute a continuing violation' and not 'merely discrete, isolated, and completed acts'" of discrimination) (citations omitted); *Janikowski v. Bendix Corp.*, 823 F.2d 945, 948 (6th Cir. 1987) (employer's "discrete decisions not to employ [plaintiff] in other positions" did not create continuing violation); *see also Provencher v. CVS Pharmacy*, 145 F.3d 5, 15 (lst Cir. 1998) (rejecting claim of continuing violation because the timely allegations were "too separated by character and time to be viewed as a repetition of the untimely acts").

In the cases relied upon by petitioner (Pet. at 13), the Courts of Appeals found continuing violations where, unlike the instant case, the plaintiffs had plead and established hostile work environment claims, which claims are typically found to fall within the continuing violation doctrine. *See,*

e.g., Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998); *West v. Philadelphia Elec. Co.*, 45 F.3d 744 (3d Cir. 1995); *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989). Thus, the factually distinguishable cases cited by petitioner do not demonstrate a split in the Courts of Appeals concerning the application of the continuing violation doctrine.

In sum, petitioner's request for review of this matter should be denied because he has not presented any legal question warranting Supreme Court review but, instead, inappropriately seeks reconsideration of the lower courts' factual determinations.

D. The Lower Courts Properly Granted Summary Judgment as to Petitioner's ERISA Claim.

With respect to petitioner's ERISA claim, again, the district court and Court of Appeals concurrently found that there were no genuine issues of material fact that precluded summary judgment. (Pet. App. at 21a-22a, 84a-85a). It is well-settled that an ERISA claim is not established where the loss of pension benefits was a "mere consequence of, but not a motivating factor behind, a termination of employment." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (citations omitted). Because the lower courts here found that petitioner failed to offer a single fact that showed that Carbide terminated him "with the intent to reduce his pension benefits" (Pet. App. at 21a), summary judgment was appropriately granted. Again, petitioner has not presented any compelling reason that the Supreme Court should review this carefully considered factual determination of the district court and the Court of Appeals.

Nevertheless, petitioner relies on a misconstruction of *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993) to urge — for the first time in this action — that the evidence of age bias that he presented at trial was sufficient to preclude summary judgment on his ERISA claim. (Pet. at 15). To the contrary, in *Hazen Paper Co.*, 507 U.S. at 609-13, 113 S. Ct. at 1705-07, this Court made clear the distinction between an employer acting on the basis of an employee's age and acting on the basis of another trait that may correlate with age, such as pension status or seniority. For purposes of establishing a violation of ERISA, a finding that an employer discriminated against an employee based on age cannot substitute for evidence that the employer terminated the employee with the specific intent to interfere with his pension benefits. *See id.; Dister*, 859 F.2d at 1111. Because petitioner failed to present any such evidence of any intent to interfere with pension rights, the lower courts properly granted summary judgment on petitioner's ERISA discrimination claim.

E. The Lower Courts Properly Rejected Petitioner's Recusal Motions.

In this action, petitioner moved twice for the district judge's disqualification[6] on the basis of: (1) comments made and *ex parte* discussions held by the district court at a settlement conference prior to the First Trial; (ii) the district court's grant of a remittitur; and (iii) comments made by the district court at a pre-trial and settlement conference prior to the Second Trial. Petitioner has not presented any compelling reason that this Court should review the district court's

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[6] Because petitioner did not appeal the denial of his first recusal motion in his first appeal to the Court of Appeals, he is precluded from seeking review of the denial of that first motion now. *See supra* p. 10. Nonetheless, respondents will address herein both of petitioner's recusal motions together.

discretionary determinations that the facts did not establish any basis for disqualification.

As a matter of law, the occurrences referenced by petitioner neither provide evidence of actual bias nor present an appearance of impartiality. First, as a preliminary matter, and as the district court stated, petitioner's motions were presumptively untimely, in that they were made after trial and after the issuance of post-trial rulings that were adverse to petitioner, and without petitioner demonstrating any good cause for delay. (Res. App. at A5). *See United States v. Bninkworth*, 68 F.3d 633, 639 (2d Cir. 1995).

Moreover, as both lower courts correctly recognized, neither the settlement discussions nor the remittitur order presented a legally sufficient basis for recusal. First, a court's holding of settlement discussions, including *ex parte* discussions upon the consent of the parties, and comments made by a court regarding the merits of a case to facilitate settlement do not demonstrate bias. *See Johnson v. Trueblood*, 629 F.2d 287, 291 (3d Cir. 1980); *Bilello v. Abbott Labs.*, 825 F. Supp. 475, 479 (E.D.N.Y. 1993); *Smith v. Sentry Ins.*, 752 F. Supp. 1058, 1061 (N.D. Ga. 1990). Likewise a judge's opinions and comments, based on facts introduced during the course of proceedings, cannot be the basis for recusal. *See Liteky v. United* States, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994).

Additionally, it is well-settled that unfavorable judicial rulings are not a basis for recusal. *See Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997); *United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992); *Harris v. State of Missouri*, 960 F.2d 738, 740 (8th Cir. 1992); *United States v. MMR Corp.*, 954 F.2d 1040, 1045 (5th Cir. 1992). Indeed, claims of bias may not be based on a judge's rulings even if a disproportionate number of rulings favors one side. *McCalden v. California Library Ass'n*, 919 F.2d 538, 547 (9th Cir. 1990); *United States v. Helmsley*, 760 F. Supp. 338, 344 (S.D.N.Y. 1991), *aff'd*, 963 F.2d 1522 (2d Cir. 1992). In

this connection, as the district court aptly noted, petitioner's counsel has a "peculiar habit of filing recusal motions" after the issuance of adverse rulings. (Pet. App. at 52a-53a n.2).

In sum, the district court did not abuse its discretion in denying petitioner's untimely and frivolous recusal motions and petitioner has presented no basis for Supreme Court review of this matter.

F. The Lower Courts Properly Remitted the Jury's Verdict After the First Jury Trial.

Finally, although petitioner does not include in his Reasons for Granting the Petition any arguments as to the propriety of the remittitur of the damage award issued by the jury at the first trial, petitioner peppers his Statement of the Case with assertions that the remittitur was improper. Specifically, petitioner claims that, after *Lightfoot I*, the district court did not comply with the Court of Appeals' directive that on remand the district court "reconsider[]" the grant of a remittitur. (Pet. at 5). Petitioner's argument is sheer nonsense.

In connection with his first appeal to the Court of Appeals, petitioner challenged the district court's remittitur, arguing that:

> the court's reduction of the verdict constituted error as a matter of law, that it violated his right to a jury trial, that the size of the [$750,000] verdict was supported by the evidence, and that the district court erred by not offering him the option of a new trial as an alternative to remittitur.

(Pet. App. at 3a). The Court of Appeals held that the district court should have offered petitioner the option of a new trial on damages, and therefore remanded the case "to allow Lightfoot the opportunity to exercise this option." (Pet App. at 3a-4a). Accordingly, petitioner was offered, elected and participated in a Second Trial on damages.

After the Second Trial, petitioner re-raised in his second appeal to the Court of Appeals (*"Lightfoot II"*), the same arguments about the impropriety of the remittitur that he had raised in *Lightfoot I*, and also claimed that the district court had disregarded the Court of Appeals' directive to "reconsider" the remittitur. In *Lightfoot II* the Court of Appeals stated that all of petitioner's contentions regarding the remittitur had been considered and ruled on in *Lightfoot I*, that petitioner's only meritorious contention had been that petitioner should have been offered the option of a new trial on damages, and that that was the sole purpose of the remand. (Pet. App. at 3a-4a). Thus, petitioner's claim that the district court did not heed the Court of Appeals' directive on remand is without basis.

Finally, as previously stated, aside from requiring the district court to offer petitioner the option of a new trial, the Court of Appeals concurred completely with the district court that the $750,000 verdict was excessive and not supported by the evidence at the First Trial. Thus, given the concurrent factual findings of both lower courts that the remittitur of the damages award after the First Trial to $75,000 was appropriate, there is no compelling reason for this Court to review the grant of the remittitur.

Conclusion

For the reasons set forth above, we respectfully submit that the petition should be denied.

Respectfully submitted,

JOEL E. COHEN
Counsel of Record
NANCY SOLOMON WEISS
MCDERMOTT, WILL & EMERY
Attorneys for Respondents
Union Carbide Corporation,
A.W. Lutz and
W.E. Shackelford
50 Rockefeller Plaza
New York, New York 10020
(212) 547-5400